A.F.R.

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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.9 of 2003

APPELLANT: (In Jail) — Yadu Kumar Patel, S/o Radhelal Patel, Aged about 22 years, R/o Barna, Thana Arjuni, District – Dhamtari (C.G.)

- Versus -

RESPONDENT: — State of Chhattisgarh, Through D.M. Dhamtari.

(Criminal appeal under Section 374 (2) of the Cr.P.C.)

Appearance:

Mr. Arun Kochar, counsel for the appellant.

Mr. Arun Sao, Govt. Advocate for the State/respondent.

ORAL JUDGMENT
(16-5-2007)

Sunil Kumar Sinha, J.

1. This appeal is directed against the judgment of conviction and order of sentence dated 30-11-2002 passed in Sessions Trial No.274/2002 by the Additional Sessions Judge, Dhamtari,whereby,the said Court, after holding the appellant guilty of offence punishable under Section 376 (1) of the I.P.C., sentenced him to undergo R.I. for ten years and pay a fine of Rs.10,000/-, in default of payment of fine to further undergo R.I. for one year.

2. Case of the prosecution is that on 27-4-2002 at about 12 noon, the prosecutrix (PW-11) had gone to take bath near a motor pump installed in her fields. After taking bath,when she was wearing clothes, this appellant came over there, caught hold of the prosecutrix and after putting off her clothes, got her lay down on a cot (which was there in the Jhala, a small hut, near the pump) and committed forceful sexual intercourse against her. When the prosecutrix made hue and cry, Shatrughan (PW-2), whose fields are also situated in the nearby locality, came over there and saw that the appellant was lying on the prosecutrix,who was lying on the cot,which was there in the Jhala. The appellant ran away from the place of occurrence after seeing

Shatrughan. Just thereafter, three girls namely, Pushpa, Phoolkunwar & Savitri also reached to the place of occurrence and took the prosecutrix to her house. Father of the prosecutrix had gone to attend a marriage. He was called from the marriage house and the story was narrated to him by the prosecutrix. Thereafter, the report Ex.P-15 was lodged by the prosecutrix at about 3 p.m. on the same day.

3. During the course of investigation, the prosecutrix was sent for medical examination and was examined by Dr. (Smt.) Asha Tripathi (PW-3) who prepared her report Ex.P-7. According to her observation, the prosecutrix was aged about 13 years. Her secondary sexual characters were not fully developed. Auxiliary hairs and pubic hairs were very few and her breasts were also not developed. In the internal examination, she found dry blood on the perineum, labia minora and labia majora were also not fully developed. There was one scratch mark in the vulva admeasuring 1/6" x 1/4". Vulva was inflamed and reddish in colour and she was complaining pains while touching the inflamed portions. Some white secretion was also seen in vulva, however, hymen of the girl was not ruptured. Clothes of the prosecutrix were seized under Ex.P-2. Her mark sheets of Class-V (Ex.P-4) and transfer certificate (Ex.P-5) were also seized under Ex.P-3. Admission register of the school was also seized and copy of its relevant page was collected as Ex.P-13. According to this register and also according to the other school certificates, her date of birth was 17-2-1990, according to which, she would be aged about 12 years 2 months and 10 days. Site plan was prepared under Ex.P-6. Appellant Yadu Kumar Patel was arrested and he was also medically examined by Dr. D.S. Dev (PW-8) who prepared his report Ex.P-11, according to which he was able to perform sexual intercourse.

4. After completion of usual investigation, charge sheet was filed against the appellant in the Court of Chief Judicial Magistrate, Dhamtari, who in turn committed the case to the Court of Sessions, from where the matter was received on transfer by the Court of Additional Sessions Judge, Dhamtari, who conducted trial and passed the impugned judgment of conviction and order of sentence on 30-11-2002. It is against this judgment of conviction and order of sentence, awarded to the appellant, the appellant has preferred this appeal.

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5. Conviction of the appellant is based upon the testimony of the prosecutrix (PW-11), Shatrughan (PW-2) and supporting evidence of her mother & father along with the evidence of Dr. (Smt.) Asha Tripathi (PW-3). The Additional Sessions Judge recorded a finding that the prosecutrix was aged about 12 years & 2 months on the date of incident and thereafter, he also recorded a finding that she was subjected to forceful sexual intercourse by the appellant, as such, the appellant was guilty of offence under Section 376 of the I.P.C.

6. Learned counsel for the appellant does not dispute the finding pertaining to the date of birth of the prosecutrix. He only raised a point that as per the medical report of the prosecutrix, her hymen was intact, therefore, it was not a case of penetration, as such, the appellant cannot be convicted under Section 376 (1) of the I.P.C. His submission is that at the most, it may be a case of attempt to commit penetration and the offence would fall under Section 376/ 511 of the I.P.C. Alternatively, he also argues that the sentence awarded to the appellant i.e. R.I. for ten years is too harsh in the present facts and circumstances of this case which may be reduced to minimum, preferably to the period already undergone by the appellant which comes to about 5 years.

7. On the other hand, learned State Counsel opposed these arguments. He supports the judgment of conviction and order of sentence awarded by the trial Court.

8. I have heard learned counsel for the parties at length and perused the record of the sessions Court.

9. So far as offence under Section 376 of the I.P.C. is concerned, the prosecutrix (PW-11) deposed that on the fateful day she had gone to take bath near the motor pump of her fields and when after taking bath she was wearing clothes, the appellant came there, caught hold of her and threw her on the cot which was there in the Jhala near the motor pump and after undressing her, he committed forceful sexual intercourse against her. She has also stated that when she made hue and cry, Shatrughan (PW-2) came over there and witnessed the occurrence. She has further stated that three other ladies namely,

Pushpa Bai (PW-13), Phoolkunwar (PW-14) & Savitri also came to the place of occurrence and they have taken her to the house. She has further stated that at that time, her father was not present, when her father came she narrated the story to him and thereafter, the report was lodged. This evidence of the prosecutrix is supported by the evidence of Shatrughan (PW-2) who stated that when he heard the noise of prosecutrix, he went towards the Jhala and he could see that the appellant was lying over the prosecutrix and both were on a cot. He had a talk with the appellant as to how he is doing like this? on which the appellant got down from the cot and ran away.

10. Other two witnesses namely, Pushpa Bai & Phoolkunwar were also examined as PW-13 & PW-14, respectively, but they have turned hostile. The prosecutrix has been cross-examined at length and many questions pertaining to the manner of commission of sexual intercourse were put to her, but the outcome of her evidence is that according to her, she was subjected to forceful sexual intercourse by the appellant who had made complete penetration and thereafter only she was left by him.

11. Learned counsel for the appellant mainly raises the point that it was not a case of rape or penetration as according to the medical report of the prosecutrix, hymen of the prosecutrix was intact and injury on the private part would only be a suggestive of attempt to commit rape or try to commit penetration and in such a situation, offence under Section 376 of the I.P.C. would not be made out against the appellant.

12. In the matter of **Tarkeshwar Sahu vs. State of Bihar (now Jharkhand)** reported in **(2006) 8 SCC 560**, the Apex Court held vide para 10 that under Section 375 of the I.P.C., six categories indicated therein are the basic ingredients of the offence. The Supreme Court observed that in the facts and circumstances of the said case, where the prosecutrix was 12 years of age, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 of the I.P.C. is penetration which is altogether missing in the said case, the Apex Court said that no offence under Section 376 of the I.P.C. can be

made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the I.P.C. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 of the I.P.C. The Apex Court also referred the earlier decision rendered by it in the matter of ***State of U.P. vs. Babul Nath*** reported in **(1994) 6 SCC 29**. In that case, the Apex Court had dealt with the basic ingredients of the offence under Section 375 in the following words:

> "8. It may here be noticed that Section 375 IPC defines rape and the explanation to Section 375 reads as follows:
>
> > '*Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.'
>
> From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim of the prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

13. It also referred to another decision rendered by the Kerala High Court in the matter of **State of Kerala vs. Kundumkara Govindan** reported in **1969 Cri.L.J. 818**, in which the said Court observed as under:

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> "The crux of the offence under Section 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight."

14. Quoting all these judgments, the Apex Court held in para 13 that

> "In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC."

15. For penetration, the Apex Court said that according to Concise Oxford Dictionary "penetrate" means "find access into or through, pass through".

16. In case of a girl of tender age, rupture of hymen, in the event of penetration, is not as a matter of rule. In cases where the hymen is deep seated, it may not rupture though there may be a penetration. In case of a forcible attempt to penetrate also, there are chances that the hymen of the victim may not rupture particularly when it is deep seated. The presence of redness and inflammation over the vagina is at least a sign that either a complete penetration has taken place or a partial penetration has taken place or a forcible attempt to penetrate was made against the victim. Modi opines in his Medical Jurisprudence that in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum. Please see **Modi's Medical Jurisprudence and Toxicology, 23rd Edn., page 928**.

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17. In the case of **Aman Kumar and another vs. State of Haryana** reported in **2004 Cr.L.R. (SC) 207** it has been observed by the Apex Court in para 7 that

> "The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The *actus reus* is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, or the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Parietal penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable u/s. 376 IPC."

18. In the light of above decisions of the Supreme Court and further in the light of other medico legal decision, it cannot be held that since hymen of the girl was intact, it was not a case of penetration either partial or complete and offence under Section 376 of the I.P.C. would not be made out. Other attending circumstances i.e. evidence of the prosecutrix, evidence of the eyewitness and the supporting medical

evidence, which shows injuries on private part of the prosecutrix, make it clear that in fact, it was a case of partial penetration and in the facts and circumstances of the case, offence under Section 376 of the I.P.C. would be made out against the appellant. The argument advanced by learned counsel for the appellant has no force and the same cannot be entertained.

19. Lastly, coming to the quantum of sentence, learned counsel for the appellant refers to the decision of the Apex Court rendered in the matter of **State of Chhattisgarh vs. Derha** reported in **(2004) 9 SCC 699**. In the said case, rape was committed against a girl aged about 8 years and the accused was aged about 18 years on the date of incident and he had also served about 6 ½ years imprisonment consequent to the sentence imposed on him and was having a family. In such circumstances, the Apex Court vide para 8 of the judgment, while allowing the appeal of the State and setting aside the judgment of the High Court, reduced the sentence to 7 years R.I. from 10 years.

20. The principle of proportion between crime and punishment is governed by the "*Doctrine of just desert*". The doctrine is the foundation of criminal sentence which is ultimately awarded for punishment to the wrong doer. What one really deserves should be the punishment for having committed a crime is the underlying principle. The punishment must not be disproportionately great is corollary of "just desert" which is governed by the same principle which says that there cannot be a punishment without guilt and the basic element behind the principle is the proportion between crime and punishment. The lesser is the gravity of the crime, the smaller would be the punishment and the greater is the gravity of the crime, the higher would be the punishment, subject to the ancillary factors for determining the proportion of the same, though all further subject to the statutory obligations specifically provided by law in force.

21. In case on hand, admittedly the appellant was aged about 22 years on the date of incident and the girl was aged in between 12 and 13 years. The appellant is in jail since the first date of his arrest i.e. 8-5-2002, thereby he has already undergone the sentence for a period of about five years and in the facts and circumstances of this case, I deem it

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appropriate to reduce his sentence from 10 years to 7 years which would serve the ends of justice being the quantum "just desert".

22. In the result, the appeal is partly allowed. Conviction awarded to the appellant under Section 376 (1) of the I.P.C. is confirmed, however, his sentence is reduced from 10 years R.I. to 7 years R.I. Sentence of fine of Rs.10,000/- is also reduced to Rs.5,000/-, in default of payment of fine, the appellant shall further undergo R.I. for one year more. If the amount of fine is deposited, that shall be paid to the prosecutrix (PW-11) as per the direction of the Sessions Court vide para 36 of the impugned judgment, however, the amount contained in para 36 as Rs.8,000/- shall be read as Rs.5,000/-. The appellant shall be entitled to set off and he shall be entitled to any legal remission permissible in law for having already served the above sentence of imprisonment.

Sd/-
Sunil Kumar Sinha
Judge

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